

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 1179 of 1987

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA

- =====
1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements?
 2. To be referred to the Reporter or not? : YES
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge? : NO

SAFIYABAI HASANALI

Versus

HEIRS OF MARIAMBEN WD/O HASAN JIVA

Appearance:

MR BIPIN I MEHTA for Petitioner

CORAM : MR.JUSTICE D.C.SRIVASTAVA

Date of decision: 11/08/2000

ORAL JUDGEMENT

1. This is landlord's revision u/s 29[2] of the Bombay Rent Act against the judgement and decree of the lower appellate Court refusing to grant decree for eviction to the revisionist against the respondent.

2. The brief facts giving rise to this revision are

as under :-

2.1 One room and a kitchen on the first floor of the house owned by the revisionist was let out to the respondent at a monthly rent of Rs.4/-. It was alleged that the tenant - respondent fell in arrears of 28 months rent amounting to Rs.104/-, which he did not pay despite service of notice of demand issued on 25th January 1978. The other ground for eviction was that the tenant - respondent had opened an aperture for a passage in an area of 4.5 ft. x 5 ft. in the common wall of the plaintiff's premises which was in the nature of breach of terms of tenancy. On these two grounds, eviction of the tenant - respondent was sought.

3. The tenant - respondent resisted the suit on the ground that he did not commit any default in payment of rent. It was alleged by the tenant that, upon receipt of notice of demand, the entire amount was tendered by money order, but it was refused by the plaintiff. It was further pleaded that, on receipt of the summons, the entire amount of arrears of rent was deposited in the trial Court on the first day of appearance of the respondent. Regarding committing breach of terms of tenancy, it was denied that an aperture was opened by the tenant - respondent or that he committed breach of the terms of tenancy.

4. The trial Court found that the plaintiff - landlord succeeded in establishing both the grounds against the tenant - respondent. Accordingly, decree for eviction etc. was passed. It may be mentioned that a dispute of standard rent was also raised by the tenant - respondent, which was accepted by the trial Court, which held that the standard rent was Rs.3/- per month, and not Rs.4/- per month.

5. The tenant - respondent preferred an appeal against the judgement and decree of the trial Court. The appeal was allowed by the lower appellate Court which set aside the decree for eviction passed against the tenant. It is therefore this revision by the landlord.

6. Learned counsel for the parties were heard and the judgements of the two Courts were examined.

7. It is a case of non-concurrent finding of fact recorded by the two Courts below. Realizing that this Court's interference in a revision u/s 29[2] of the Bombay Rent Act is limited, still it has to be seen whether the judgement and decree of the lower appellate

Court is in accordance with law or not.

8. The first point for consideration is whether the tenant - respondent was in arrears of rent for more than six months, which she failed to pay despite service of notice of demand. Issuance of notice of demand and its service is not disputed by the tenant. It is also not disputed that 28 months rent was due which amounted to Rs.104/-. The defence however was that the entire amount was sent through money order to the plaintiff which was refused. It was further the case of the tenant that the money order was sent within a month of service of notice of demand. The lower appellate Court found that the notice of demand was issued on 25th January 1978, which was served on the tenant on 27th January 1978 vide exh.26. According to the tenant, money order was sent twice, but it was refused. There appears to be some confusion in the judgement of the lower appellate Court whether money order coupon was produced or not. There is a mention of coupon exh.30 which bears postal stamp dated 25th February 1978. It appears to be postal receipt of sending money order for a sum of Rs.104/-. It is thus clear that the money order was sent within a month of service of notice of demand and the entire amount demanded in the notice was remitted by money order. Neither the landlord nor the tenant entered the witness box. However, the witnesses examined on their behalf gave statements which were considered by the lower appellate Court and the lower appellate Court found that the statement given by Kayamali, son of the plaintiff, was firstly in the nature of admission that, after service of notice, demand payment of rent has been made. However, in cross examination, he gave an evasive reply that he does not know whether the amount was sent by money order or not. When the postal receipt was shown, he admitted that, on the basis of exh.30, he can say that money order was sent.

9. Even if a very rigid view is taken in the matter that the money order coupon which was refused has not been filed, the matter can be examined from another angle. One of the stands of the tenant was that the standard rent was excessive. Thus, he dispute of standard rent was raised by the tenant within a month of service of notice for demand. This dispute of the standard rent was resolved by the trial Court only at the time of final disposal of the suit and the trial Court did find that the standard rent should be Rs.3/- per month, and not the contractual rate of rent at Rs.4/- per month. As such, if there was bonafide dispute of standard rent, the case could not be said to have been

covered by section 12[3][a] of the Rent Act. If section 12[3][a] of the Act did not apply strictly, then the tenant could save his eviction u/s 12[3][b] of the Act. Section 12[3][b] provides that, "In any other case, no decree for eviction shall be passed in any such suit if, on the first day of hearing of the suit or on or before such other date as the Court may fix, the tenant pays or tenders in Court the standard rent and permitted increased then due and thereafter." It is a specific case of the tenant - respondent that, on the first day of appearance in Court after receipt of summons from the trial Court, he deposited the entire rent due from him even at the rate of Rs.4/- per month. This shows bonafide of the tenant that, without waiting for adjudication of the dispute regarding the standard rent, he deposited the rent due at the contractual rate as claimed by the landlady. If this was so, then the tenant becomes entitled to protection u/s 12[3][b] of the Bombay Rent Act and as such, it cannot be said that the tenant could be evicted on the ground of his failing to pay the arrears of rent exceeding six months within a month of service of notice of demand. The finding of the lower appellate Court reversing the finding of the trial Court on this point is therefore strictly in accordance with law. It therefore requires no interference.

10. The second ground for eviction has been that the tenant committed breach of the terms of tenancy by opening an aperture in the common wall admeasuring 4.5 ft. x 5 ft. approximately. On this point, the lower appellate Court has carefully examined the evidence on record. It came to the conclusion that the landlady could not establish as to when aperture was made by the tenant. On the other hand, the lower appellate Court found that probably because the common wall was old by decay, an aperture must have been made and since the tenant failed to repair it, it was used as passage for beneficial enjoyment of the demised premises. This finding also requires no interference. The lower appellate Court has rightly observed that no rent note was produced, nor it was established by the landlady as to what were the terms of tenancy. Unless the landlady alleged and proved that there was specific term in the contract of tenancy that the tenant shall not be entitled to use or open an aperture for beneficial enjoyment of the tenanted accommodation, no decree for eviction could be passed. Since the terms of tenancy could not be established by the landlady, the lower appellate Court was justified in holding that the tenant - respondent did not commit any breach of the terms of tenancy.

11. It was also urged that the tenant committed waste of the property. I however do not find any ground u/s 13 of the Bombay Rent Act under which the decree for eviction could be passed on ground of tenant committing waste of the property. It has been discussed in the judgement of the lower appellate Court that the provision of section 13[1][a] of the Rent Act are not applicable. This section provides that, "The landlord shall be entitled to recover possession of any premises if the Court is satisfied that the tenant has committed any act contrary to the provisions of clause (o) of section 108 of the Transfer of Property Act, 1882." Section 108 (o) of the Transfer of Property Act, 1882 inter alia permits the lessee to use the property etc. as if a man of ordinary prudence would use the same as if the same were of his own. There is restriction on the user of the lessee of the demised premises that he must not use or permit another person to use the property for a purpose other than for which it was leased. This provision is hardly violated because there is no allegation nor is there any evidence that the tenant used or permitted another person to use the demised premises for a purpose other than for which it was leased. There is also no evidence or allegation that any damage was caused by the tenant to the demised premises. Likewise, there is no allegation or evidence that the tenant committed any other act which is destructive or permanently injurious to the demised premises. Thus, none of the prohibitions contained in section 108[o] of the Transfer of Property Act are attracted in the instant case against the tenant. Consequently, the lower appellate Court was justified in refusing decree for eviction against the tenant on this ground, as well.

12. No other point was pressed and therefore, I do not find any merit in this revision, which is hereby dismissed with no order as to costs.

[D.C.SRIVASTAVA, J.]

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